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No. 83-537
No. 83-693

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-537

MASSACHUSETTS LABORERS DISTRICT COUNCIL AND LABORERS, LOCAL 609
PETITIONERS

v.

ABREEN CORP., ET AL.
RESPONDENTS

No. 83-693

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO
PETITIONER

v.

ABREEN CORP., ET AL.
RESPONDENTS

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for Respondent Abreen Corp. In Opposition

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Questions Presented

1. In No. 83-693 the questions presented are:

   a) Whether the lower courts erred in holding that petitioner Laborers International Union violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act where the International threatened a supplier with unlawful action?

   b) Whether the lower courts erred in holding that petitioner Laborers International Union violated Section 8(b)(4) where the International actually participated in and supported the unlawful conduct of its affiliates?

2. In No. 83-537 the question presented is:

   Whether the lower courts erred in holding petitioners Massachusetts Laborers District Council and Laborers Local 609 liable under Section 303 of the Labor Management Relations Act for certain damages proximately caused by petitioners' violations of Section 8(b)(4)?

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Labor Management Relations Act § 303, 29 U.S.C. § 187 *Passim*

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for Respondent Abreen Corp. In Opposition

Respondent Abreen Corp. respectfully requests that this Court deny the petitions for writs of certiorari seeking review of the First Circuit's opinion in this case. That opinion is reported at 709 F.2d 748.

Statement of the Case

This case arose out of the unlawful secondary boycott engaged in by the petitioner labor organizations in March and April, 1979, during construction of the Hilton Inn and Natick Village Mall in Natick, Massachusetts. Abreen Corp. ("Abreen") was the general contractor for construction of that hotel and adjacent shopping center.

On March 19, 1979,[1] Laborers Local 609 ("Local 609") began picketing at the job site against the steel erection subcontractor Seppala & Aho with picket signs protesting Seppala & Aho's failure to conform to community standards for wages and fringe benefits. A reserved gate, Gate 1, was established for the use of Seppala & Aho's employees and suppliers. From Tuesday, March 20 through Friday, March 23 the Laborers' pickets complied with the reserved gate system and picketed only at Gate 1. Two days later, however, the petitioner labor organizations embarked upon a campaign of unlawful secondary pressure.

On Sunday evening, March 25, Laborers International Vice President Arthur Coia telephoned Aldo Baretta, Vice President of Durastone Flexicore, the company supplying pre-cast concrete plank to the project. Baretta's employees were represented by two different locals of the Laborers Union, and Baretta and Coia had known one another for years. In fact, Baretta had experienced problems with Coia in the past. Coia threatened Baretta that he could expect a problem the following morning because the building trades unions were going to picket the job site. As a result of that phone call, Durastone cancelled all shipments of pre-cast concrete plank to the project. Previously, the shop steward for Durastone's employees, who were represented by Local 315 of the Laborers International Union, had told the company that on the instructions of their business agent the Durastone employees would refuse to load trucks destined for the

[1] All dates hereinafter cited are 1979 unless otherwise noted.

Natick site. A few days later, the Durastone plant in Smithfield, Rhode Island was picketed by a number of pickets under the direction of a Local 609 business agent. The lower courts held that the Coia call was an unlawful threat.

The picketing at the site on Monday, March 26th was unlawful. Laborers Local 609 continued to picket Seppala & Aho at Gate 1. However, pickets also appeared at neutral Gate 2 carrying signs which complained that minority workers on the project were working for wages which were less than area standards. The "minority worker" picket signs being carried at Gate 2 failed to identify either the employer against whom the picketing was directed or the labor organization engaged in the picketing. As the district court concluded, this "minority worker" picketing was a "deception" and a "sham" orchestrated by Local 609 and intended to bring pressure to bear upon Abreen in furtherance of the Laborers' dispute with Seppala & Aho. Local 609 Vice President James Merloni, Jr. had custody of the minority worker picket signs, controlled the positioning of the minority worker pickets, and openly picketed with those minority worker pickets at neutral Gate 2 on a number of occasions. The picketing at neutral Gate 2 under the minority worker signs continued until Monday, April 9. On that date the signs were amended to state that Abreen was the employer being picketed and to identify Local 609 as the labor organization engaged in picketing on behalf of minority workers.

Unlawful picketing at the site continued from March 26th until April 16th. Picketing during that period was under the direction of Local 609 Vice President Merloni and Massachusetts Laborers District Council ("MLDC" and "District Council") Field Representative Maurice Blumberg. The lower courts found that the object of the picketing was to cause neutral contractors and suppliers not to do business or

deliver services and supplies to the project while there were non-union subcontractors working on the site. That finding, not challenged in this Court, was based not only on the unions' flagrant violations of the *Moore Dry Dock* rules governing lawful picketing,[2] but also on various statements and threats made by Merloni and Blumberg evidencing the unlawful motive behind the picketing. The lower courts further found that the picketing disrupted work on the site and delayed the delivery of essential materials to the project.

Abreen filed suit in the United States District Court for the District of Massachusetts against the petitioner labor organizations under Section 303 of the Labor Management Relations Act of 1947, 29 U.S. § 187, to recover damages incurred as a result of the petitioners' violations of Section 8(b)(4) of the National Labor Relations Act. 29 U.S.C. § 158(b)(4). The case was consolidated for trial with a similar suit brought by respondents Bernard and Wasserman, the developers of the project. Following a four day bench trial, the district court entered judgment in favor of Abreen Corp. and against the three union defendants jointly and severally for damages of $120,264.39.

The petitioner unions appealed the judgment to the United States Court of Appeals for the First Circuit, and Abreen filed

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[2] In *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950), the National Labor Relations Board held that in order to avoid an inference that it is motivated by a prohibited secondary intent, picketing at a multi-employer job site must conform to the following requirements:

1) it must be strictly limited to times when the situs of the dispute is located on the secondary employer's premises,
2) at the time of the picketing the primary employer must be engaged in its normal business at the situs,
3) the picketing must be limited to places reasonably close to the location of the situs, and
4) the picketing must disclose clearly that the dispute is with the primary employer.

92 NLRB at 549. The unions' picketing in this case was found to have violated the third and fourth rules set forth above.

a cross-appeal. The court of appeals affirmed the district court's finding that all three labor organizations had violated Section 303, and modified the district court's award of damages in certain particulars not at issue in this Court.[3]

Reasons for Denying the Writs

I. The Lower Courts' Decision That The Laborers International Union Violated Section 8(b)(4) Does Not Conflict With Any Decisions Of This Court.

The Laborers International Union, petitioner in No. 83-693, contends that the lower courts' determination that International Vice President Coia threatened Durastone Vice President Baretta in violation of Section 8(b)(4)(ii)(B) conflicts with this Court's decision in *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964), and also that the lower courts' determination that the International participated in and supported the unlawful conduct of its affiliates conflicts with this Court's decisions in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) and *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979) (Int'l Pet. at 7). Petitioner's contentions are without merit. The above decisions of this Court were correctly applied by the lower courts. In essence, the petitioner has presented as legal issues what are actually questions of fact resolved by the courts below.

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[3] Pursuant to this Court's intervening decision in *Summit Valley Industries v. Local 112, Carpenters*, 456 U.S 717 (1982), the district court's award of $12,556.00 in attorney's fees and litigation expenses incurred in an effort to stop the unlawful picketing was reversed. The court of appeals also reversed the district court's refusal to award $3,300.00 in attorney's fees incurred in negotiations with Durastone during the period of the supplier's refusal to deliver. Accordingly, the court of appeals reduced the damages awarded to Abreen Corp. by $9,256.00.

A. *The Lower Courts' Conclusion That The International Violated Section 8(b)(4) By Threatening A Supplier With Unlawful Action Does Not Conflict With This Court's Holding in NLRB v. Servette That It Is Permissible To Appeal To A Supplier And To Threaten A Supplier With Lawful Conduct.*

Petitioner contends that finding the Coia call to be an unlawful threat is at odds with this Court's holding in *NLRB v. Servette* that Section 8(b)(4) does not preclude a labor organization from appealing to a manager of neutral employer to support the union's boycott of a primary employer with whom the union has a dispute (Int'l Pet. at 8). Petitioner's contention notwithstanding, the lower courts' decisions present no conflict with this Court's decision in *Servette*. Indeed, the court of appeals not only cited *Servette*, but specifically acknowledged that *Servette* would have authorized an "appeal" from Coia to Baretta (Int'l App. at 26). The district court found, however, that the Coia call was not an appeal but rather a threat.[4] In affirming the district court's finding of a threat the court of appeals engaged in a thorough analysis of the substantial evidence and reasonable inferences

[4] Petitioner contends that finding the Coia call to be a threat was a determination only of the appellate court, and that the appellate court erred in making that finding of fact on its own (Int.'l Pet. at 8 n.4, 12-14). It is clear, however, that the appellate court did not make an independent finding of fact. Rather, it affirmed the district court's finding of a threat. At trial, the district court denied the defendant International's motion for a directed verdict on the issue of whether Coia had threatened Baretta with the following words:

> Well, the testimony is from Mr. Baretta who has known Mr. Coia since 1950. He received a phone call on Sunday evening from Arthur Coia. The testimony was to the effect he was to expect a problem the following morning on the Hilton job. The building trades were going to picket a job site.
>
> Now that may not be a very forceful threat but certainly the message that Mr. Baretta received was very, very clear; as a result he said he called and cancelled the shipments.

(Tr. 3: 142-143).

supporting that finding of fact (Int'l App. at 7, 25-28). Moreover, the factual determination that a threat was made was not only carefully and fully considered, it was correctly decided as well. Petitioner's contention that the Coia call was an appeal rather than a threat ignores the essential fact that Coia never asked Baretta not to ship concrete plank, only to expect a problem if he did. As the lower courts correctly held, that is a threat not an appeal. Thus, Petitioner's continuing concern for the fact that *Servette* authorizes a peaceful appeal is misplaced.

The International further contends that even if the Coia call did constitute a threat, it was, nonetheless, merely a threat to engage in lawful picketing, and that such a threat to engage in protected conduct is itself protected under this Court's holding in *Servette* (Int'l Pet. at 8). This second alleged conflict with *Servette* also fails to withstand analysis.

As a threshold matter, the Coia threat fails to qualify for the *Servette* exemption as a matter of form. Under *Servette*, it is only threats to take *protected* action that are lawful. Petitioner's convoluted argument that the Coia threat could conceivably have related to lawful picketing misses the point entirely. Unlike the precise warnings to the supermarket managers in *Servette* that handbills would be distributed outside their stores, Coia's threat was not by its own terms limited to a threat to take solely protected action. It was, rather, an intentionally and impermissibly vague threat to "expect a

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In its subsequent opinion the district court echoed that language in holding the call to be a threat: "It makes no difference if the tone of the call was friendly; the message was clear—the precast concrete was not to be delivered—and the message had the desired effect" (Int'l App. at 43). Thus, the court of appeals did not make an independent finding of fact, but merely affirmed the district court's finding. As the court of appeals noted,

> The [district] court found that despite the tone of the phone call, Coia was implicitly threatening Baretta with economic pressure if Durastone delivered the precast concrete. The context in which the call was made supports this interpretation.

(Int'l App. at 28).

problem." While such an open-ended threat undoubtedly achieves a heightened coercive effect, it does so at the cost of forfeiting the protection which would otherwise attach to a threat to take only protected action.

Furthermore, the Coia threat also fails to qualify for the *Servette* exemption as a matter of substance. Contrary to petitioner's contention, the record evidence does not permit a conclusion that the Coia call related solely to protected conduct. Petitioner points out that the picketing at the site from Monday, March 19th through Friday, March 23rd was lawful, and contends that the Coia call of Sunday, March 25th should be viewed as relating to that lawful picketing rather than the unlawful picketing which began on March 26th (Int'l Pet. at 10). As demonstrated by his very words, however, the Coia call related solely to the unlawful picketing which commenced on Monday, March 26th. Coia made no mention of the picketing which had occurred prior to his call. Rather, Coia's pointed message to Baretta was the precursory threat to expect a problem "the following morning." Thus, the Coia threat can only be construed as relating to unlawful, not lawful, picketing. Moreover, the lower courts correctly found that the Coia call was not merely a threat of unlawful picketing at the job site but an implicit threat to take secondary action against Durastone itself. As the court of appeals explained:

> The [district] court found that despite the tone of the phone call, Coia was implicitly threatening Baretta with economic pressure if Durastone delivered the precast concrete. The context in which the call was made supports this interpretation . . . [I]t was not unreasonable for the district court to infer that Coia was conveying a veiled threat to Durastone of labor trouble unless it honored Local 609's picket lines.
>
> (Int'l App. at 28).

* * *

> To be sure, Coia's statement, read literally, merely pointed out the existence of the Natick picketing. But in the circumstances the district court was entitled to read

> more into it than that. Durastone's own employees were represented by a local affiliated with the International. And since the Natick picketing had been in progress for some time and Durastone's employees had informed the company of its support for it, the court could have inferred that an officer of the International would not have made such a call merely to convey such obvious information as that there was picketing in progress at the Natick jobsite. Rather it could reasonably infer that the call from such an individual was intended to put the power of the International behind an implicit threat to take secondary action against Durastone itself.

(Int'l App. at 7).

Neither a threat related to unlawful picketing at the jobsite nor a threat to take secondary action against Durastone itself are protected by this Court's holding in *Servette*. As the court of appeals noted with reference to *Servette*, "Unions may make peaceful appeals for support from the management of companies dealing with the primary employer. Unions may not, however, threaten other employers, including suppliers, with secondary activity" (Int'l App. at 7, 26) (citations omitted).

Thus, the lower courts' decisions do not conflict with this Court's decision in *Servette*. As the petition demonstrates, the International Union takes issue not with the legal standard employed but rather with the lower courts' factual determinations that the Coia call was a threat not an appeal, and that it was a threat to take unlawful as opposed to lawful action. Neither of those affirmed factual determinations warrant review by this Court.

B. *The Lower Courts' Conclusion That The International Violated Section 8(b)(4) By Its Actual Participation In And Support Of Its Affiliates' Unlawful Conduct Does Not Conflict With This Court's Holdings In United Mine Workers v. Gibbs and Carbon Fuel Co. v. United Mine Workers That An International Union Cannot Be Held Liable Absent Proof Of Support, Ratification Or Participation In An Affiliate's Unlawful Conduct.*

Petitioner Laborers International Union further contends that the lower courts' decisions are in conflict with the decisions of this Court in *United Mine Workers v. Gibbs* and *Carbon Fuel Co. v. United Mine Workers* in that the International has been held liable for the lawful actions of its own agents performed in connection with a labor dispute merely because its affiliates' conduct in said dispute was unlawful (Int'l Pet. at 14).[5]

The lower courts' decisions cannot be deemed inconsistent with the above-cited decisions of this Court. Indeed, the court

[5] The International acknowledges that this argument is predicated on the assumption that the Coia call was not an unlawful threat, and that the Court does not reach this argument unless the Court reverses the lower court's factual determination that the Coia call was itself an unlawful threat within the meaning of Section 8(b)(4)(ii)(B) (Int'l Pet. at 14-15).

Assuming, *arguendo*, that the Coia call was not itself an independent unlawful threat within the meaning of Section 8(b)(4)(ii)(B), however, it nonetheless constitutes International participation in, promotion of, and support for the unlawful picketing engaged in by Local 609 and MLDC in violation of Section 8(b)(4). Unlike *Gibbs* and *Carbon Fuel*, the International's involvement in this case was not limited to the performance of normal union functions unrelated to its affiliates' unlawful conduct. Rather, the International and its affiliates were jointly engaged in a pervasive and egregious violation of Section 8(b)(4), and the Coia call was a cornerstone of that entire effort. As the district court noted, "There was no purpose for the call other than to promote the interest of the picketing" (Int'l App. at 43). The picketing which the call both announced and promoted was unlawful. Thus, the International's actions in this case constituted direct participation in and support for the unlawful conduct of its affiliates.

of appeals specifically cited both cases in providing the following explication of the basic principles applicable to determining the liability of a parent labor organization:

> Both the MLDC and the International argue that the district court erred by finding them jointly and severally liable with Local 609. We disagree.
>
> Any international or regional affiliate of a local union may not be liable for the local's unfair labor practices merely by virtue of its affiliation with the local. *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979). The regional or international, however, may be liable if it either has an agency relationship with the local, *id.*, or independently participates in the local's illegal conduct. *Cf. id.* at 213 (international cannot be liable when it has neither instigated, supported, ratified or encouraged union's unlawful activity); *United Mine Workers v. Gibbs*, 383 U.S. 715, 735 (1966) (same); *NLRB v. Local 1016, United Brotherhood of Carpenters*, 273 F.2d 686 (2d Cir. 1960) (same).

(Int'l App. at 25).

Accordingly, the lower courts did not apply an improper legal standard or decide this case in conflict with applicable precedent of this Court. The district court held the District Council and the International Union jointly and severally liable with Local 609 for Abreen's damages "because their officers and agents, through their acts and statements, participated directly in the unlawful activity and actively promoted, supported and encouraged the unlawful activities" (Int'l App. at 42). The court of appeals rejected the two parent unions' challenge to that finding, concluding that, "Here, there was sufficient evidence of the District Council and the International's participation in and support of the unlawful conduct to hold them jointly and severally liable with the local" (Int'l App. at 25). Petitioner's contention that the lower courts applied an improper legal standard notwithstanding, it is apparent that petitioner's real dispute is with the lower courts'

factual determination that the Laborers' International Union actually participated in and supported the unlawful conduct of its affiliates. That affirmed factual determination does not warrant review by this Court.

II. The First Circuit Did Not Impose A Standard Of Causation For Proof Of Section 303 Damages Different From The Proximate Cause Required By This Court's Decision In Teamsters v. Morton.

The District Council and Local 609, petitioners in No. 83-537, contest being held jointly and severally liable along with the International for that portion of Abreen's damages representing the increased construction costs resulting from the absence of flexicore. Their joint petition is premised on the contention that the First Circuit imposed a standard of causation which permits liability for damages not proximately caused by union wrongdoing (MLDC and Local 609 Pet. at 5-10). As a reading of the court's opinion demonstrates, the First Circuit committed no such error.

The court of appeals did not impose a standard of causation different from the proximate cause required by this Court's decision in *Teamsters v. Morton*, 377 U.S. 252 (1964). Indeed, the First Circuit specifically cited *Teamsters v. Morton* as the standard which it was applying (MLDC and Local 609 App. at 28). The excerpted portion of the court's opinion which petitioners cite for the proposition that a different standard was established is the court's remark that "the fact that certain losses may not have resulted directly from the specific acts which evidenced the unions' unlawful intentions is irrelevant so long as the losses are traceable to actions forming part of the overall secondary activity" (MLDC and Local 609 Pet. at 9-10). The court's complete observation on the point was as follows:

> We think the unions' argument depends on an overly narrow conception of secondary activity. It presumes that the only activities which are prohibited, and hence

> for which the union may be liable, are those particular actions which so clearly impose impermissible pressure upon a secondary employer that they would be found illegal under all circumstances. What this analysis ignores is that the trier of fact must look at the totality of circumstances, and that where a substantial portion of a union's conduct is undeniably secondary, the trier of fact may conclude that the activity as a whole had an unlawful *object* and illegally pressured secondary employers. Accordingly, the fact that certain losses may not have resulted directly from the specific acts which evidenced the unions' unlawful *intentions* is irrelevant so long as the losses are traceable to actions forming part of the overall secondary activity.

(MLDC and Local 609 App. at 28-29) (citations omitted) (emphasis supplied). When read in the context of the Court's entire discussion, it is clear that the excerpted portion was intended as and constitutes a correct explication of the "motivation" element of a Section 8(b)(4) violation. A labor organization's conduct is violative of 8(b)(4)(B) only when its inducement of employees or its restraint and coercion of persons engaged in commerce is for the prohibited purpose of forcing one person to cease doing business with another. 29 U.S.C. § 158(b)(4)(i)(ii)(B). What the court of appeals correctly pointed out was that each specific act of inducement or coercion need not independently evidence the unlawful "intention" behind the act. Rather, the court of appeals was affirming the permissibility of the district court's inference, based on the overwhelming direct and indirect evidence of unlawful motive, that all of the unions' secondary conduct had an unlawful object. Consistent with the holding in *Teamsters v. Morton*, however, the court of appeals was careful to point out that recoverable losses are limited to those traceable to "the overall secondary activity", and not those traceable to lawful primary activity. Accordingly, the court of appeals affirmed the district court's award of the contested damages because,

"In the instant case our review of the record convinces us that the district court did not err in finding that the concrete planks were not available to Abreen as a result of the picketing at the Natick site which was unlawful" (MLDC and Local 609 App. at 29).

Thus, the court of appeals did not employ a standard of causation other than proximate cause. While the District Council and Local 609 claim to take issue with the legal standard of causation imposed by the court of appeals, it seems clear that their real problem is with the lower courts' factual determination that the absence of flexicore was proximately caused by the unions' unlawful picketing.[6] That affirmed finding of fact does not warrant review by this Court.

In addition to the fact that the court of appeals did not employ a standard of causation other than proximate cause,

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[6] Petitioners contend that as a supplier to Seppala & Aho, Durastone was required to enter the project through Gate 1, that Seppala & Aho could lawfully be picketed at Gate 1, and "Thus, the fact that the picket line was shown to be secondary in that it moved to Gate 2 cannot be relied upon as causing the Durastone losses" (MLDC and Local 609 Pet. at 10). However, petitioners' argument ignores the essential fact that the picketing at Gate 1 was unlawful, not lawful.

As the court of appeals noted, it is well settled that picketing is legal or illegal depending upon "the object of the union's picketing" (MLDC and Local 609 App. at 19-20, and cases cited therein). Thus, as the court of appeals further noted, even picketing which is limited solely to the primary gate is in violation of Section 8(b)(4) if that picketing is the product of an unlawful motive (MLDC and Local 609 App. at 21, and cases cited therein). *See also, Iron Workers, Local 433 v. NLRB*, 598 F.2d 1154, 1157 (9th Cir. 1979); *Pickens-Bond Construction Company v. Carpenters Local 690*, 586 F.2d 1234, 1241 (8th Cir. 1978); *Landstrom v. Teamsters Local 65*, 476 F.2d 1189, (2nd Cir. 1973). In this case, the presence of the picketing at Gate 2 was but one of several indicia of the unlawful motive behind the picketing, including the minority worker subterfuge, the picketing of Durastone in Rhode Island, and the numerous statements and acts of various union representatives. The district court found:

> [T]he object of the picketing was to coerce neutral contractors and suppliers not to do business or to deliver services and sup-

there is further reason to deny the writ in No. 83-537. The District Council and Local 609 essentially argue that if anyone caused the absence of flexicore it was the International, and that petitioners should not be held liable for those damages merely because they are affiliated with the International (MLDC and Local 609 Pet. at 6, 10 n.5). Not only does that argument ignore the fact that conduct engaged in by the District Council and Local 609 was found to have proximately caused Abreen's damages, including its flexicore-related damages, it also ignores the fact that Local 609, MLDC, and the International were held jointly as well as severally liable for those damages based on the lower courts' factual finding that the instant secondary boycott was the product of a concerted and coordinated effort among all three unions (MLDC and Local 609 App. at 27, 41-42). As with the determination that proximate cause existed, this Court should not grant certiorari merely to review that affirmed finding of fact.

Conclusion

For the foregoing reasons, these petitions for writs of certiorari should be denied.

Respectfully submitted,

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plies to the project while there were non-union subcontractors working on that site.

(MLDC and Local 609 App. at 41).

With that as its motive, the picketing at Gate 1 was patently unlawful.